Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 77-226

WARDEN, DuPAGE COUNTY JAIL,

Petitioner,

v.

GEORGE H. HEALEY, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This petition requests the Court to review the judgment of the Seventh Circuit Court of Appeals in its Opinion of April 21, 1977 (Docket No. 76-1946) reported as *United States ex rel. Healey* v. *Cannon,* 553 F. 2d 1052 (7th Cir. 1977). The Court of Appeals denied a Petition for Rehearing with suggestion for rehearing *en banc* on June 15, 1977. A copy of this order is attached to this petition as Appendix A. A copy of the slip opinion is attached to this petition as Appendix B. A copy of the opinion of the District Court is attached to this petition as Appendix C.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit issued its Opinion on April 21, 1977 and denied a Petition For Rehearing With Suggestion For Rehearing En Banc on June 15, 1977. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Has the principle of the finality of guilty pleas set forth in the *Brady* trilogy[1] been violated?

A. What are the boundaries of the "competence demanded of attorneys in criminal cases?"

B. Was counsel's advice in the present case within the "range of competence demanded of attorneys in criminal cases?"

C. Was defendant's plea of guilty motivated by counsel's advice or a desire to avoid the death penalty?

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1. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

STATEMENT OF THE CASE

In order to avoid needless repetition, petitioner presents here only a short outline of the facts of this case. A detailed narration and analysis of the facts is set forth in the dissenting opinion of Judge Harlington Wood of the Seventh Circuit Court of Appeals (Appendix B, page B14) and this court is respectfully referred to that presentation.

In late 1969 the marriage of George H. Healey, Junior, respondent in this court and defendant in the state court (referred to in this petition by name or as defendant), began to disintegrate. Healey had been drinking and gambling heavily and his wife finally left him. Both spouses went to live with their respective parents. On September 25, 1969, after the furniture had been moved out of the Healeys' former apartment, Healey encountered his wife there. He attacked her, chased her to a neighbor's apartment where, in full view of the neighbor and her child, he shot and beat his wife to death. The crime occurred in Elmhurst, Illinois, a middle class suburb of Chicago in DuPage County.

The case was tried before a jury. The prosecution put on overwhelming evidence of defendant's guilt including the testimony of the neighbor eyewitness. Healey himself took the stand and admitted the act. His defense consisted of an attempt to show that the crime was manslaughter instead of murder. When this attempt proved futile, he changed his plea to guilty and was sentenced to 40-75 years in the penitentiary.

He later attacked his plea on a number of grounds, including the one presented here, in a post conviction petition in state court. Judge Alfred Woodward of the DuPage County, Illinois, Circuit Court, held a hearing on the peti-

tion and denied relief. He was affirmed by the Illinois Appellate Court, *People* v. *Healey*, 23 Ill. App. 3d 214, 267 N.E. 753 (2nd Dist. 1971). The transcripts and common law records of both the postconviction proceeding and the trial are in the Record on Appeal before the Court of Appeals.

Healey then filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. That Court granted the Writ on two grounds. First, the court held that Healey was denied his right to a public trial under the Sixth Amendment to the United States Constitution because Healey's guilty plea was taken in the trial judge's chambers. Second, the court held that the plea was not knowingly made because of the advice given by counsel that certain trial errors would be preserved for review notwithstanding the plea of guilty. (See Appendix C)

The Court of Appeals for the Seventh Circuit affirmed on the second ground but did not reach the first. The court held that Healey's guilty plea was motivated by counsel's advice and that the advice did not measure up to the standard enunciated in *McMann* v. *Richardson*, cited in note 1 above. Judge Wood dissented. He would have held that the guilty plea was entered in order to avoid the death penalty and that counsel's advice was not a significant factor.

REASONS FOR GRANTING THE WRIT

A.

Varying Standards Among The Circuit Courts Of Appeal For Competence Of Counsel Will Inject Uncertainty Into The Range Of Competence Demanded Of Attorneys In Criminal Cases.

Unless this court sets an outer limit on the range of competence demanded of attorneys in criminal cases, *McMann* v. *Richardson*, cited above, 397 U.S. at 770-771, changes now taking place in the circuit courts of appeal in the law of competence of counsel will result in uneven and unjust application of the *Richardson* standard because different ranges of competence will be demanded in different circuits. The once-universal rule on competence of counsel which required that a defendant's trial be reduced to a sham and mockery of justice, e.g. *Johnson* v. *United States*, 422 F. 2d 555 (7th Cir. 1970), is now being replaced in some circuits but is still adhered to by other circuits. See Anno. Effective Representation by Counsel, 26 A.L.R. Fed. 218, 239.

The Second Circuit, for instance, still holds to the sham and mockery standard, *United States* v. *Yanishevsky*, 500 F. 2d 1327 (2d Cir. 1974). Other circuits, for example the District of Columbia Circuit, have set forth certain duties owed by counsel to his client, *United States* v. *DeCoster*, 159 U.S. App. D.C. 326, 487 F. 2d 1197 (D.C. Cir. 1973). Other Circuits have adopted the standard of whether counsel is reasonably likely to render and is rendering reasonably effective assistance, *Beasley* v. *United States*, 491 F. 2d 687, 26 A.L.R. Fed. 204 (6th Cir. 1974). The Seventh Circuit has required a minimum standard of professional representation, *United States ex rel. Williams* v. *Twomey*, 510 F. 2d 634 (7th Cir. 1975), cert. denied 423 U.S. 876 (1975)

The net result in guilty plea cases of these differing standards is that "the range of competence expected of attorneys in criminal cases" will be different in different circuits. This situation will create uncertainty as to when a guilty plea is invalid because of defective advice of counsel and when it is not. It will be an open invitation for convicts like the present one, who once having received the benefits of pleading guilty, decide they want to go after an even better deal.

B.

Counsel's Advice Was Within The Range Of Competence Demanded Of Attorneys In Criminal Cases.

McMann v. *Richardson,* cited above, requires that a criminal defendant, in making the decision whether or not to plead guilty is entitled to legal advice within the range of competence demanded of attorneys in criminal cases. In the present case the advice received by defendant George H. Healey, Jr., was well within that range. Unfortunately, the Seventh Circuit Court of Appeals has, with the advantages of repose and hindsight, engaged in second-guessing counsel who was required to give his advice in the heat of a murder trial where it looked like his client would get the electric chair. This court should grant certiorari and reverse the judgment of the Court of Appeals not only because it is wrong and has vitiated the perfectly valid guilty plea of an obviously guilty man but because of the erroneous and dangerous content which the Court of Appeals has injected into the standard set in *Richardson.* The opinion of the Seventh Circuit will, in the words of dissenting Judge Wood,

> prompt much sifting and reconstruction of attorney advice to suit their purposes by others seeking a way out after a change of heart. Appendix B page B24

In applying the law to the present case, it is first necessary to resolve a conflict between defendant's version of the advice he was given and his attorney's version. Notwithstanding their statements to the contrary, both courts below implicitly credited defendant's version. This was contrary to the finding of the state trial judge who heard the testimony and credited the attorney. Defendant's lawyer, Frank Wesolowski, testified that he advised defendant that if the trial judge was incorrect in refusing a manslaughter instruction and refusing to admit the proffered testimony of a psychiatrist in support of that instruction, that notwithstanding a guilty plea, a reviewing court would pass on the correctness of those two rulings (Post-conviction hearing transcript, Exhibit C, Vol. II, pages 140-142.) On the other hand, defendant's father testified that Mr. Wesolowski told them three times that all defendants' legal rights would be preserved, notwithstanding a plea of guilty, Post-conviction Transcript, pages 84-89. In concluding that petitioner was not incompetently advised and that the plea was valid, Judge Woodward, the state hearing judge, must have resolved this conflict in favor of the testimony of Mr. Wesolowski. Judge Woodward conducted the postconviction hearing; he listened to the testimony of the witnesses and observed their demeanor. Moreover, he could have chosen to believe Mr. Wesolowski because he had nothing to gain or lose from his testimony and, since he had previously represented defendant, might very well have been willing to phrase his testimony in a manner favorable to petitioner. On the other hand, he could have disbelieved defendant and his father because of their obvious desire to get defendant out of prison. The point is that resolving this evidentiary conflict was the province of the trier of fact at the post conviction hearing, not the

province of the District Court or the Court of Appeals which had only the cold record upon which to base its finding. 28 U.S.C. 2254(d); *LaValle* v. *Delle Rose*, 410 U.S. 690 (1973).

It is clear that Judge Woodward was justified, once having resolved the evidentiary question, in finding that Mr. Wesolowski's advice to petitioner was not such as would invalidate the plea. The advice was not, as defendant claimed and as the court below found, that any and all trial errors would be preserved under any and all circumstances but only that in his opinion petitioner could raise before a reviewing court the two points mentioned above and only those points if and only if the trial judge erred in his rulings on those points. The advice that was given petitioner was much more cautious and more limited than he and the courts below now portray it to be.

Mr. Wesolowski did not guarantee that the trial judge had indeed erred and that the purported errors would indeed be considered by a reviewing court and that petitioner's conviction would indeed be reversed. Yet petitioner subsequently complained to the courts below that this did not happen and expected relief. Petitioner's claim is particularly weak in light of the fact that he said at the taking of the plea that he admitted he was guilty and he wanted to face up to it. (Appendix B, page B22) Apparently he has had a change of heart. It was not the advice given petitioner that was in error but his own exaggerated estimation of his chances to escape responsibility for his crime.

Not only was Mr. Wesolowski's advice much more circumspect than defendant portrays it but it had a basis in the case law. There was a long line of cases beginning with *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1950) cited by the dissent in *McMann* v. *Richardson*, 397 U.S. at

776, Note 2, which held that a coerced confession could invalidate a guilty plea and implied that other violations might have the same result. See particularly *White* v. *Pepersack*, 352 F. 2d 470 (4th Cir. 1965); *Smiley* v. *Wilson*, 378 F. 2d 144 (9th Cir. 1967); *Reed* v. *Henderson*, 385 F. 2d 995 (6th Cir. 1967). The opinion of the Second Circuit Court of Appeals in *United States ex rel. Ross* v. *McMann*, 409 F. 2d 1016 (2d Cir. 1969) (subsequently reversed by this court along with *Richardson*, cited above) is especially instructive as to the state of the law up to that time.

Furthermore, each of this line of cases articulates as the basis for the court's judgment the general principle that an involuntary guilty plea is invalid and may be set aside. Counsel was certainly entitled to conclude as he did that if the plea was involuntary for any reason, then there was a chance to get it set aside. At this point it must again be emphasized that counsel's advice was cautious and circumspect. He did not guarantee success or even give good odds for success. He implied only that there was a chance the claim would be heard by "a reviewing court." Affidavit of Frank Wesolowski, Common Law Record of Postconviction Hearing, Exhibit C, Vol. I in the District Court, page C-253. Indeed, Healey has argued in state court and the courts below that the plea was involuntary for any number of reasons including but not limited to the fact that he was offered a term of years in return for a plea of guilty by the prosecution and when he insisted on his right to a jury trial, the death penalty was sought [See *Simmons* v. *United States*, 390 U.S. 377 (1968) and *United States* v. *Jackson*, 390 U.S. 570 (1968)], the fact that his manslaughter defense was precluded by the judge, and the fact that he may have been mentally incompetent. Postconviction Petitions, Exhibit C, Volume III, pages C111-C125 and Volume IV; Petition for Writ of Habeas Corpus. Hence there was ample basis in the law for counsel's advice.

The Court of Appeals argues that counsel's advice was wrong because the rule prevailed in Illinois that a guilty plea waives all nonjurisdictional errors. This is irrelevant. In nearly every one of the cases referred to above the court cited that rule as the first premise of its decision and then went on to hold that if the plea was invalid under federal constitutional law, it would be set aside notwithstanding the rule. It is clear that federal constitutional law must prevail over any state rule. *United States ex rel. Collins* v. *Maroney,* 382 F. 2d 547, 548 (3rd Cir. 1967).

The court also stated that the errors complained of were not of constitutional magnitude. Again, this is a matter of judgment, not a matter of black letter law. Errors concerning both evidentiary matters and jury instructions can rise to a constitutional level. See *Corpus* v. *Beto,* 469 F. 2d 953 (5th Cir. 1972), *cert. denied* 414 U.S. 932 (1973); *Heads* v. *Beto,* 468 F. 2d 240 (5th Cir. 1972, *cert. denied* 410 U.S. 969 (1973); *Winfield* v. *Cascles,* 403 F. Supp. 956 (D.C. N.Y. 1975). The appeals court cannot fairly be allowed to second guess the judgment of counsel made in the heat of battle.

The real problem with counsel's advice, of course, is that the line of cases he relied upon was later overruled or at least severely limited in the *Brady* trilogy and today his advice would probably be wrong. However, as the *Brady* trilogy holds, counsel cannot be required to predict the future of constitutional law. Cf. *Pierson* v. *Ray,* 386 U.S. 547 (1966).

Counsel's advice must also be considered within the context of all the surrounding circumstances. As shown clearly in Judge Wood's dissent below (Appendix B, page B24) after the defense effort collapsed, the threat of the death penalty was very real. His client's life was quite literally in Mr. Wesolowski's hands. Surely, Mr. Wesolowski's primary

concern at the time was to preserve his client's life and a plea of guilty was the best way to remove the risk of death. Since there was an arguable basis in the law for alleviating his client's concern about appeal, Mr. Wesolowski can hardly be condemned for giving the advice he did under those circumstances. The Court of Appeals, of course, had the double hindsight of the knowledge that the cases supporting counsel's advice have been overruled by the *Brady* trilogy, cited above, and the death penalty itself has been declared unconstitutional in the way it was imposed in Illinois at the time, *Furman* v. *Georgia,* 408 U.S. 238 (1972). Mr. Wesolowski did not have the benefit of that hindsight.

Thus the Court of Appeals failed to take into account all the circumstances surrounding counsel's advice and judged it in the light of subsequent changes in the law. This is an entirely unreasonable view of the standard by which the advice of counsel must be judged, especially in light of the fact that the evidence in the present case overwhelmingly supported a guilty verdict and imposition of the death penalty. Because the Court of Appeals' judgment is wrong and because of the deleterious effect it will have on the finality of guilty pleas, this court should grant certiorari and reverse.

C.

Defendant's Plea Was Made In Order To Escape The Death Penalty And Not As A Result Of Counsel's Advice On The Preservation Of Error For Appeal.

The Court of Appeals' second error consists in making the advice about error the *sine qua non* of the plea of guilty where the record clearly shows that the reason for the plea was to escape the death penalty. At the time, defendant had been proven guilty of murder; he had no defense; and

his major concern was to save his life. Now that he is serving his prison term and has time on his hands with his life no longer in danger, he has decided to try to evade the consequences of his decision.

Judge Wood's dissent in the court below (Appendix B pages B14-B24) clearly and persuasively shows how the majority erred on this point based on a detailed analysis of the record and a refutation of the majority's reasoning. This analysis need not be repeated here.

There is only one additional factor to be emphasized. This is the nature of the community where the crime and the trial took place. If the crime had been committed in Chicago, it probably would have attracted little notice. It was, however, committed in suburban, middle-class DuPage County where such crimes are rare and not lightly regarded. Because of this the possibility that the death penalty would be imposed was greatly increased.

Defendant and his lawyer were well aware of these facts. Mr. Weslowski had practiced criminal law in both Cook (Chicago) and DuPage Counties (Postconviction Hearing Transcript, Exhibit C, Vol. II, pages 123-124) and defendant had lived in DuPage County much of his life.

Because defendant's plea of guilty was motivated by the fact that he was guilty and that he wanted to avoid being executed, even if the lawyer's advice were erroneous, the plea was still valid. A contrary holding would imply that had the advice been different, defendant would voluntarily have subjected himself to the possibility of months, more probably years on death row while appealing his conviction and the threat of eventual execution to get the alleged errors he complains of reviewed. It is not likely that he would have done this and only now when his life is out of danger does he try to take back the plea he entered in 1970 for such a compelling reason.

CONCLUSION

For these reasons, petitioner respectfully requests this court to grant a writ of certiorari to review this erroneous and dangerous precedent set by the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

EXHIBIT A

In The

United States Court of Appeals

For The Seventh Circuit

Chicago, Illinois 60604

June 15, 1977.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA, ex rel. GEORGE H. HEALEY, JR., *Petitioner-Appellee,* vs. No. 76-1946 JOSEPH G. CANNON, Warden, Illinois State Penitentiary, *Respondent-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 74-C 3046 Hubert L. Will, Judge.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Joseph G. Cannon, Respondent-Appellant, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *in banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

No. 76-1946

UNITED STATES OF AMERICA, ex rel. GEORGE H. HEALEY, JR.,

Petitioner-Appellee,

v.

JOSEPH G. CANNON, Warden, Illinois State Penitentiary,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-3046—**Hubert L. Will,** Judge.

Before FAIRCHILD, *Chief Judge,* SPRECHER and WOOD, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The State of Illinois, respondent-appellant, appeals from an order granting petitioner-appellee a writ of habeas corpus. We consider in this appeal one of the two issues upon which the deci-

sion of the district court is based: whether petitioner was so misadvised by trial counsel regarding the consequences of his guilty plea that the plea must be invalidated because unintelligently given under the standards articulated in *McMann* v. *Richardson*, 397 U.S. 759 (1970). We affirm.[1]

I

Petitioner was charged with the murder of his wife, and entered a plea of not guilty upon the advice of his appointed counsel. His jury trial commenced in the Circuit Court of DuPage County in January 1970, during which petitioner took the stand and testified regarding the homicide.[2] Petitioner did not deny committing the

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1. Our affirmance on this ground makes it unnecessary to review the district court's decision that petitioner's Sixth Amendment right to a public trial was violated by the state trial court's action of conducting the proceedings surrounding the acceptance of petitioner's guilty plea in chambers. Also, petitioner raised numerous other assertions of error which occurred in the state court proceedings as grounds supporting his claim for habeas corpus relief in the district court. We have reviewed these remaining contentions and are satisfied that they were properly disposed of in the memorandum and order of the district court. Therefore, we restrict our discussion here to the question of the validity of petitioner's guilty plea.

2. The essential facts surrounding Mrs. Healey's death are not indispute. Petitioner and his wife separated after 12 years of marriage, as a result of strife impelled by petitioner's heavy drinking and mounting gambling debts. Mrs. Healey sought legal advice regarding divorce. Petitioner became despondent to the point of contemplating suicide, and immersed himself in continual drinking.

acts which caused the death of his wife, but proceeded to trial upon the theory that, at worst, his conduct constituted voluntary manslaughter under the Illinois law, because he lacked the requisite mental state to commit murder due to his intoxication,[3] or alternatively, that he was provoked at the time of the incident.[4] In support of

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On the morning of Mrs. Healey's death, petitioner drove to his wife's apartment and despite her efforts to block his entrance, forced his way in after he thought he observed a man exiting quickly through the rear door. Petitioner fired several shots, one striking Mrs. Healey in the abdomen, and then pursued her through the back exit of the apartmtnt and into an apartment occupied by a neighbor. His gun jammed, and in full view of the neighbor, he beat Mrs. Healey's head and face with its butt until her skull was crushed.

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3. Illinois law at that time permitted a defendant charged with murder to be convicted of the lesser included offense of voluntary manslaughter where the accused's state of voluntary intoxication was so extreme at the time of the homicide as to suspend entirely the power of reasoning. *People* v. *Strader*, 23 Ill. 2d 13, 177 N.E. 2d 126 (1961); *People* v. *Hicks*, 35 Ill. 2d 390, 220 N.E. 2d 461 (1966).

4. ILL. REV. STAT. ch. 38, § 9-2 provides in pertinent part:

(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

these theories, petitioner sought to introduce the testimony of a psychiatrist regarding petitioner's mental state, in the form of an answer to a hypothetical question based on events surrounding the homicide. Petitioner also proffered the testimony of two priests concerning his mental state and degree of intoxication immediately prior to the incident. Following an admissibility hearing in chambers, at which the judge, both counsel, the bailiff, the court reporter and petitioner were present, the trial court refused to permit the introduction of this evidence. Moreover, the court refused a tendered jury instruction on the elements of the lesser included offense of voluntary manslaughter.

Petitioner's counsel requested a brief recess in order to confer with both petitioner and his father. The attorney advised cessation of the trial proceeding by the entry of a plea of guilty to murder. In response to repeated inquiries concerning the possibility of raising error in the trial court's rulings on appeal following a guilty plea, both petitioner and his father testified that the attorney assured them that all questionable points were adequately preserved and were cognizable by an appellate court, and that petitioner's legal rights on appeal remained unchanged whether he pleaded guilty or was adjudged guilty by a jury.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

Apparently, petitioner's trial contention was that a series of provocative events incited the homicide: petitioner's wife had taken their children and left him, moving the furniture from their apartment; she refused to consider a reconciliation and consulted an attorney regarding divorce; she was accompanied by another man in her apartment on the morning of her death, and attempted to prevent petitioner's entry.

Petitioner's counsel testified regarding his advice to petitioner during this conference that:

> The defendant inquired of me whether or not the possibility that the Judge ruled in error would be preserved for appeal,—that ruling would refer to both the hypothetical and the ruling on the instruction—and I indicated that if the Judge's ruling in fact was error, notwithstanding a guilty plea, it was my personal opinion that a reviewing Court would review the issue, and the father and the defendant extracted assurances from me, although of course all I could do was give them what was my opinion of the law.

Following this conference, the proceeding resumed in chambers and petitioner, accompanied by his father and his attorney, entered a plea of guilty to murder. The trial court thoroughly examined petitioner concerning his change of plea,[5] and subsequently sentenced him to serve a term of 40 to 75 years imprisonment.

The conviction and sentence remained undisturbed following an appeal which challenged only the excessiveness of the sentence imposed. *People* v. *Healey*, 132 Ill. App. 2d 190, 267 N.E. 2d 753 (1971), and leave to appeal that decision was denied by the Illinois Supreme Court.

Petitioner sought post conviction relief in the Circuit Court of DuPage County, alleging *inter alia* that his guilty plea was not intelligently given because made in reliance upon the erroneous advice of his appointed counsel. The

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5. The trial court's questioning of petitioner is in compliance with standards set forth in *Boykin* v. *Alabama*, 395 U.S. 238 (1969) and Illinois Supreme Court Rule 402. Ill. Rev. Stat. ch. 110A, § 402.

court, after conducting an evidentiary hearing denied relief. The Illinois Appellate Court affirmed, holding in relation to petitioner's allegation of constitutional inadequacy of his trial counsel that:

> As to the allegation of improper advice at the time the change of plea was discussed, defendant asserts that he was assured by counsel that the psychiatric testimony and manslaughter instruction issues would not be waived by a plea of guilty. Our review of the record leads to the conclusion that even if this advice was erroneous it was harmless and did not result in substantial prejudice to defendant's rights since the proof of defendant's guilt was overwhelming. The validity of the plea is unaffected by this advice.

People v. *Healey*, 23 Ill. App. 3d 214, 220, 318 N.E. 2d 89, 94 (1974). Leave to appeal this decision was denied by the Illinois Supreme Court.

His available state remedies thus exhausted, petitioner filed a pro se petition seeking habeas relief under 28 U.S.C. § 2254. Counsel was appointed to represent petitioner, and after determining that the necessity for holding another evidentiary hearing was obviated by the development of material facts in the state proceedings, *Townsend* v. *Sain*, 372 U.S. 293, 312-14 (1963), the district court granted relief, based on its findings that petitioner's guilty plea was rendered unintelligent, and therefore invalid, by the misstatements of counsel with respect to the effect of a guilty plea on appellate rights, and that petitioner's right to a public trial was infringed by the trial court in conducting in-chambers proceedings. Respondent has appealed.

II

Because a plea of guilty absolutely waives the constitutional protections which insulate the accused and stands as a grave admission that the accused has transgressed the

law, it accords with due process only if voluntarily and intelligently given. *Machibroda* v. *United States*, 368 U.S. 487 (1962); *Kercheval* v. *United States*, 274 U.S. 220 (1927). An intelligent plea is the culmination of a rational decision-making process, in which the accused assesses the numerous factors which bear upon his choice of whether to formally admit his guilt or to put the State to its proof. The plea must represent the informed, self-determined choice of the defendant among practicable alternatives. *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948); *DeMeerleer* v. *Michigan*, 329 U.S. 663 (1947). The *Brady* trilogy[6] holds that a plea is deemed an intelligent determination of the defendant if it is given with the assistance of competent counsel. A defendant is not exempt from making the decision of whether to plead guilty merely because the choice is a difficult one; but a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of feasible options. *Hammond* v. *United States*, 528 F. 2d 15 (4th Cir. 1975); *Colson* v. *Smith*, 438 F. 2d 1075 (5th Cir. 1971).

Petitioner's contention that he was denied the effective assistance of counsel in his decision to enter a guilty plea, thereby invalidating the plea as unintelligently given, raises in the first instance questions of fact. What assistance and advice was actually afforded the accused in aid of his assessment of the feasible alternatives, and whether the accused in fact premised his decision to waive fundamental rights and enter a plea upon the valuation articulated by his

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6. *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

attorney of the effects and ultimate consequences of the plea, and of alternatives to pleading, involve factual inquiries. Upon independent review of the record, we affirm the district court's factual findings.

First, any attempt to elevate to a matter of substance the inconsequential difference between the testimony of petitioner and his father and the testimony of the trial attorney regarding what advice was given Healey must fail. Petitioner maintains he was informed that none of his rights on appeal would be jeopardized by his entry of a guilty plea. Respondent asserts the advice was that if the trial court had actually committed error in its specific evidentiary rulings concerning the admissibility of psychiatric testimony and in its refusal to instruct the jury regarding voluntary manslaughter, a reviewing court would take cognizance of the error and reverse the conviction, notwithstanding the guilty plea. However, the timing of the plea belies the existence of any conflict. The plea was given toward the close of the trial, throughout which petitioner persisted in his plea of not guilty, and closely followed the particular rulings by the trial court which were the subject of counsel's assurances to petitioner regarding appellate review. Since these particular rulings were crucial to the progress of Healey's trial, and would have formed the basis for appellate review had he not entered a plea, we assume that these purported trial errors were the focus of petitioner's concerns pertaining to the preservation of error for appellate review. We therefore accept as factually accurate respondent's version of the advice given petitioner, since it does not significantly conflict with petitioner's version.

Second, the district court's finding that petitioner relied upon this advice regarding the consequences of entering a guilty plea in his decision to terminate the trial proceedings is incontrovertible. The record evidences keen concern on

the part of both petitioner and his father that appellate review of trial errors would not be foreclosed by a guilty plea. The attorney assured them three times during the course of a brief conference that the trial court's determination on these crucial rulings was sufficiently preserved for appellate scrutiny. Under these circumstances, respondent's assertion that Healey's desire to avoid imposition of the death penalty formed the sole motivation for his change of plea is incredible. The State had requested the qualification of the jury for the death penalty at the outset, and had indicated throughout the trial that it would demand the death penalty were a verdict of guilty returned. If petitioner considered tendering a plea of guilty solely to escape execution, the propitious time for doing so would have been prior to trial, rather than near its conclusion. Petitioner's urgent concern for the preservation of trial errors for appellate review, and his decision to change his plea only after extracting assurances from his lawyer regarding the appealability of the trial court's rulings minimize any fear of the death penalty as a motivating factor in his plea. The district court's finding that petitioner's reliance upon the advice of his attorney induced his plea is amply supported by the record.

This resolution of preliminary factual matters, however, merely initiates our inquiry, for the precise question of whether a particular accused has been deprived of the effective assistance of counsel is ultimately an issue of law. The Supreme Court has repeatedly emphasized that the effectiveness of legal representation afforded criminal defendants is to be appraised by normative legal standards which, when applied in a specific factual context, yield a resolution concerning whether a particular defendant received constitutionally adequate assistance of counsel. *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Brady* v. *United*

States, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970). In the guilty plea context, a lawyer need not give wholly accurate advice in order to render effective assistance; he need not correctly predict the admissibility of evidence or anticipate future judicial holdings. His advice, however, must be "within the range of competence demanded of attorneys in criminal cases.'" *McMann, supra*, at 770-71.

Trial counsel's advice to petitioner is grossly deficient when gauged by this standard. Illinois cases establish a clear precedent that a plea of guilty constitutes an irrevocable waiver of any infirmity which was not jurisdictional or relevant to the voluntariness of the plea. *See e.g., People* v. *Popescue*, 345 Ill. 142, 177 N.E. 739 (1931); *People* v. *Baxton*, 10 Ill. 2d 295, 139 N.E. 2d 754, *cert. denied*, 353 U.S.

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7. The holding of the Illinois Appellate Court that any mistaken advice afforded Healey constituted harmless error due to overwhelming evidence of guilt is erroneous. As the district court properly noted, this standard is applicable only when a verdict of guilty has been rendered and is being reviewed. The reviewing court may examine the record to determine whether the evidence is sufficient to support the verdict, despite any claim of constitutional error. In reviewing a guilty plea, however, the record is not explored for evidence supporting the defendant's admission of guilt. Rather, the only pertinent question is whether the voluntariness of the plea or its intelligent character has been infected by constitutional error. Moreover, the harmless error doctrine is patently inapplicable to the claimed deprivation of a due process right so fundamental as the effective assistance of counsel. *Glasser* v. *United States*, 315 U.S. 60, 76 (1942); *Gideon* v. *Wainwright*, 372 U.S. 335, 340-44 (1963); *Chapman* v. *California*, 386 U.S. 18, 43 (1967) (Stewart, J., concurring).

976 (1957); *People* v. *Terry*, 12 Ill. 2d 56, 145 N.E. 2d 36 (1957), *cert. denied*, 356 U.S. 942 (1958); *People* v. *Deweese*, 27 Ill. 2d 332, 189 N.E. 2d 247 (1963); *People* v. *Dennis*, 34 Ill. 2d 219, 215 N.E. 2d 218 (1966). Thus, any irregularities occurring during a trial were not cognizable on appeal following a guilty plea under Illinois law. Counsel's statement that "if the Judge's ruling in fact was in error . . . a reviewing Court would review the issue," although somewhat circumspect, is a gross misinterpretation of this precedent. Clearly, in order to determine whether a trial court's ruling "in fact was in error," a reviewing court would be bound to take cognizance of a claim of error in the ruling and evaluate its merits. Yet, as Illinois law so clearly provides, this opportunity for appellate review of trial errors is precisely what a defendant waives by his plea of guilty. We consider this critical misstatement of prevailing state law to a defendant on trial in a state court a "serious dereliction on the part of counsel." *McMann, supra*, at 774. Relying upon this misrepresentation of Illinois law, petitioner was deprived the occasion to "rationally weigh the advantages of [continuing his] trial against the advantages of pleading guilty," *Brady, supra*, at 750, which due process requires. His plea is therefore invalid.[8]

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8. The fact that counsel couched his remarks in terms of an "opinion of the law," as opposed to a guarantee that the opinion was accurate does not vitiate the constitutional deficiency of his advice to petitioner. The function of counsel is to counsel. It is precisely the superiority of training, knowledge and understanding of a lawyer that a client seeks in eliciting an attorney's opinion regarding a legal matter. The client cannot justifiably expect a guarantee of a particular outcome; he is, however, entitled to a legal opinion which is "within the range of competence demanded of attorneys . . ." *McMann, supra*, at 771.

Respondent adverts to the fluidity of federal law regarding the effects and consequences of a guilty plea prior to the Supreme Court's opinions in the *Brady* trilogy, decided some four months subsequent to the termination of petitioner's trial. Because federal courts sometimes considered circumstances surrounding the entry of a plea in determining its validity, respondent argues that counsel's advice to the effect that a reviewing court might be cognizant of trial errors notwithstanding the plea is reasonable. This contention is meritless. The trial rulings involved here, pertaining to instructions and evidentiary matters, are not of constitutional magnitude and therefore are not cognizable by a federal court under 28 U.S.C. § 2254. Therefore, the position espoused by federal law on this question is immaterial. Moreover, the cases decided prior to the *Brady* trilogy indicate that federal courts investigated only constitutional infirmities in assessing the voluntariness and intelligence of a guilty plea. *See, e.g., Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956) (uncounseled defendant); *Chambers* v. *Florida*, 309 U.S. 227 (1940) (coerced confessions which induced and tainted subsequent guilty pleas). *See also, Moreno* v. *Beto*, 415 F. 2d 154 (5th Cir. 1969); *United States ex rel. McCloud* v. *Rundle*, 402 F. 2d 853 (3d Cir. 1968); *Kott* v. *Green*, 387 F. 2d 136 (6th Cir. 1967); *Reed* v. *Henderson*, 385 F. 2d 995 (6th Cir. 1967); *Smiley* v. *Wilson*, 378 F. 2d 144 (9th Cir. 1967), all of which involved a judicial investigation of coerced confessions which purportedly induced guilty pleas. Defects neither jurisdictional nor constitutional in nature, occurring at any prior stage in the proceedings, were deemed waived in federal courts by the entry of a guilty plea. *United States* v. *Rook*, 424 F. 2d 403, 405 (7th Cir.), *cert. denied*, 398 U.S. 966 (1970); *United States* v. *Doyle*, 348 F. 2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); *United States ex rel. Staples* v. *Pate*, 332 F. 2d 531 (7th Cir. 1964).

We note that the trial court properly and extensively admonished petitioner prior to the acceptance of his plea. While judicial admonitions in compliance with the requirements of *Boykin* v. *Alabama*, 395 U.S. 238 (1969), aid the court in discharging its obligation to ascertain the voluntary and intelligent character of a plea, we agree with the position of the Fifth Circuit that:

> [A]n equally important aspect of the courts' responsibilities in this problem area is the protection of the accused's right to the benefit of reasonably competent counsel in making his plea, especially when that plea is entered on advice of counsel. . . . In [the *Brady* trilogy] it was obvious that the Supreme Court envisioned a system under which the defendant, advised by reasonably competent counsel, makes an informed and conscious choice. . . . When this system functions satisfactorily, it is both fair and reasonable to expect that a defendant who has made his choice and received whatever benefits flow therefrom be required to live by that choice. In any particular case in which the system fails, however, it is the courts' duty to supply relief.

Colson, supra, at 1079.

In invalidating petitioner's guilty plea, we express no opinion regarding the propriety of the trial court's critical rulings. Whether the judge ruled correctly and would have been upheld on appeal is immaterial. Petitioner concluded his trial by the entry of a plea of guilty with the understanding that appellate review of the court's determinations was not thereby obviated. Because he was misadvised by counsel regarding his feasible options, due process requires that the plea be vacated.

In affixing our imprimatur to the practice of invalidating guilty pleas on the basis of conversations between a defendant and his counsel, we share the concern of the dis-

trict court that defendants will be encouraged to fabricate purported conversations in order to escape the consequences of a guilty plea. However, we agree that this concern is groundless in the unique factual context of this case. Petitioner, his father, and trial counsel essentially concur in their testimony pertaining to the content of the advice afforded petitioner. The record manifests substantial evidence in support of petitioner's claim that his plea was not intelligent because rendered upon advice of counsel which was constitutionally inadequate under the *McMann* standard. *United States ex rel. Curtis* v. *Zelker,* 466 F. 2d 1092, 1098 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973). *Cf. United States ex rel. Robinson* v. *Housewright,* 525 F. 2d 988, 991-92 (7th Cir. 1975).

Because we hold petitioner's guilty plea invalid, we do not consider whether he was deprived of the right to a public trial because the trial court accepted his plea in chambers. Accordingly, the judgment of the district court is

AFFIRMED.

WOOD, *dissenting.* I must respectfully dissent from the majority, and here set forth my reasons for taking a contrary view.

The majority finds it necessary to consider only one of two issues on appeal, the guilty plea and not the second issue, petitioner's Sixth Amendment right to a public trial. Since I disagree on the first issue I would reach the second and likewise reverse, but for present purposes it is not necessary to explain my views upon that second issue.

I fully agree with the principles and supporting cases cited by the majority, and only disagree with their interpretation as applied to the particular facts of this case. I do not believe those cases compel the result reached.

The guilty plea, made after the government had completed its case in chief and the defendant had testified in his own behalf, must be viewed in the context of the trial, the evidence and the surrounding circumstances shown in the record at the time the plea was made. I believe that perspective is necessary in order for us to try to determine whether or not the defense attorney's allegedly incorrect advice to petitioner was a sufficient motivating factor to invalidate the guilty plea as the majority holds.

To attempt this I believe the uncontroverted evidence of the murder should be lifted out of the footnote and expanded from the record. This is not for the purpose as in *People* v. *Healey*, 23 Ill. App. 3d 214 (1974), of determining whether or not the allegedly mistaken advice was only harmless error due to the overwhelming evidence of guilt, but rather to try to better understand all the circumstances surrounding the change of plea in order to determine whether that advice may have motivated the change of plea, or whether some other consideration was controlling.

The state's case consisted of the testimony of police officers, investigators, laboratory technicians and other witnesses typical to a murder case. It was not, however, a circumstantial case. There was no question of the identity of the assailant or of the nature of the attack upon the deceased. The murder took place in the adjacent apartment of a neighbor, Mrs. Dussalt, who witnessed the whole tragedy.

Mrs. Dussalt testified that Mrs. Healey ran screaming from the nearby Healey apartment into Mrs. Dussalt's apartment with her husband, the petitioner, in close pursuit. Mrs. Dussalt endeavored to close the door, but the petitioner forced his way in firing a shot from an automatic pistol

he was carrying. The bullet lodged in the kitchen wall between Mrs. Healey and Mrs. Dussalt. Mrs. Healey then ran into Mrs. Dussalt's living room with petitioner still in pursuit. He fired two more shots. Mrs. Healey fled back into the kitchen now holding her side. Mrs. Dussalt ran to protect her young son while Mrs. Healey's screaming continued. Then the screaming stopped and Mrs. Dussalt saw the petitioner standing over his wife stretched out on the kitchen floor. He told Mrs. Dussalt that it was all over and to call the police, but then he fled leaving the gun behind.

The police testified that the butt of that gun was covered with blood, hair and skin tissue. Several deep gouges were observed in Mrs. Healey's body, part of her ear had been torn off, and her skull was caved in. A pathologist, who performed a partial autopsy on Mrs. Healey, testified that Mrs. Healey had two fractured hands, two bullet holes in her chest, many cuts and bruises on her face and many deep fractures throughout her skull. The story unfolded that the gun had jammed after the first three shots, and petitioner had then used it as a club to beat his wife to death.

In his own defense the petitioner took the stand and testified about his marital problems, drinking habits and the events leading up to the murder. He related that he went to the apartment which had been shared by his wife and himself, the door was open, and his wife, who the evidence showed was fully clothed, was present. Petitioner thought he saw someone run out the other door to the apartment. I do not believe, however, that the record supports the majority's statement that "he thought he observed a man" leave the apartment. The petitioner was not sure whether the person may have been a man or a woman. He told how he pursued his wife into Mrs. Dussalt's apart-

ment with his gun, but then his testimony becomes somewhat vague about the actual details of the murder. It does however outline the testimony of Mrs. Dussalt. One more defense witness, petitioner's uncle, was called to confirm that petitioner had called him from Nebraska where petitioner had fled after the murder. At this point in the case some matters were taken up in chambers outside the presence of the jury. Defense counsel advised the court that he had two priests to be called as witnesses, and also an expert to whom he intended to propound a hypothetical question about the petitioner's mental state. It appeared to be petitioner's purpose to try to establish that his act was manslaughter, not murder. The state objected to calling the priests unless the testimony of the priests was to relate to "insanity, provocation or drunkenness" for purposes of manslaughter consideration. Defense counsel's response was that the testimony of the priests would go to "the jury's consideration as whether it is a proper case for the death penalty." The court sustained the objection after a prolonged discussion and an offer of proof on the basis that the testimony was immaterial to the manslaughter issue. The majority opinion states that the priests could have testified about petitioner's mental state and degree of intoxication immediately prior to the accident, but the record shows that one priest visited with petitioner only on Monday and the other only on Wednesday before the Thursday murder. Next the parties undertook to consider in chambers the proposed hypothetical question. After long recitations of the evidence as assumptions, the hypothetical question requested the doctor's opinion as to whether the hypothetical person in killing his wife was acting under a sudden and intense passion resulting from serious provocation by the individual killed. The state objected on the grounds that the question invaded the province of the jury by calling

for an answer to the ultimate question, and further because there was no evidence of any provocation from petitioner's wife. The objection was sustained, the court holding that there was no evidence bearing out a manslaughter theory. Consequently there was to be no manslaughter instruction. It was at this point that defense counsel asked for a short opportunity to confer with his client, and after ten or fifteen minutes came back at which time the plea was changed to guilty. During that short conference outside the presence of the court the appeal opinion was given by defense counsel upon which the majority bases its holding.

It is at that point in the proceeding, against the background of overwhelming evidence adverse to petitioner and the collapse of the defense effort, that we must try to reconstruct from the record what the motivating factor was for petitioner's decision to change his plea. It is the majority view that the petitioner's "urgent concern for the preservation of trial errors for appellate review, and his decision to change his plea only after extracting assurances from his lawyer regarding the appealability of the trial court's rulings, minimizes any fear of the death penalty as a motivating factor in his plea." Quite to the contrary, I believe that record illustrates that the change was induced by the basic human desire of petitioner to save his own life. He did not have to plead guilty in order to have trial errors reviewed on appeal. The thread of that concern with the death penalty runs throughout.

The jury had been qualified for the death penalty. Any rational view of the evidence then pending before the jury would have to be that a vicious murder had been proven well beyond a reasonable doubt, if not all doubt. It was not the rulings of the trial judge that robbed petitioner of a manslaughter defense. Viewing the record, including the proffered testimony, there is no evidence which shows in-

sanity, provocation, or drunkenness at the time of the murder, or any other excuse so as to sustain only a manslaughter charge. Even the psychiatrist chosen by the defense had concluded that petitioner suffered from no mental illness. Nothing in the record shows any provocation on the part of the deceased wife. If someone did run out the back door and if it was a man, in the circumstances shown to have existed then and there it could not be considered provocation. The petitioner was admittedly a heavy drinker, but there is insufficient evidence to show that excessive alcohol at the time was a factor in the murder. After petitioner arose on Thursday morning, he drove various places, then drove to their apartment, parked his car, had a conversation with the janitor who noticed no alcohol odor or anything unusual about the defendant, climbed the stairs to their apartment and began the fatal attack on his wife. It was obvious petitioner had no defense.

The influence on petitioner of the possible death penalty is illustrated by various things including petitioner's own allegation that he was "threatened" by the trial judge and prosecutor with the death penalty. At the state post-conviction hearing the petitioner testified as to what had taken place in the short attorney-client conference. The first question from petitioner's counsel at that hearing was:

> "What did your attorney say to you with regard to the possibility of entering a guilty plea at that point?
>
> A. You mean the results of it?
>
> Q. What did he say to you?
>
> A. He said he thought we should plead guilty that because of the way things were working out there was no defense and that the jury—he claimed that it looked like I would get the death penalty."

And later:

> Q. Did he explain to you what it meant to enter a plea of guilty?
>
> A. It just meant—he first said it meant that I would probably get a lighter sentence than if I had persisted in going on with the trial."

On cross examination the petitioner responded to the question:

> "You entered a plea, did you not. Mr. Healey, because you felt you would receive a lesser sentence than you would if you proceeded on with the conclusion of the trial? Is that correct?
>
> A. Yes, that was the general feeling."

The advice from his attorney about appeal was mentioned by petitioner in his testimony, but I cannot view those comments as having anything but minimal significance compared with the death penalty potential.

Petitioner's father, who had also been present at the attorney-client conference, testified at the post-conviction hearing that defense counsel told them "that it was not proper to continue the trial, that it would not be in my son's favor and that in view of the fact that the manslaughter instruction was not allowed, it would be futile, it would only incense and anger the judge." The father testified that when asked by his son what to do he advised him to plead guilty because the judge would be more lenient as the son had never been convicted of a crime before and because he had voluntarily surrendered. The father testified that he asked counsel "three times" about the appeal possibilities. In the testimony of defense counsel, however, I find no mention of even one question on that issue from the father, nor even any confirmation of the father's questions in the testimony of petitioner.

What defense counsel did say, as appears from his testimony in the post-conviction proceeding, was that "the decision was based on the fact that there is the everpresent [sic] possibility the jury would recommend the death penalty." Defense counsel confirmed he had given petitioner limited advice about an appeal, although the majority accepts the broader version testified to by petitioner and his father. The defense counsel explained to petitioner and his father that the court's rulings on the hypothetical question and the manslaughter instruction were preserved. However, the defense counsel testified that he did not advise that it was his opinion that the case would be reversed and remanded. I do not see that it is probable or reasonable to conclude that petitioner changed his plea as a result of such uncertain and limited appeal advice. Further, petitioner's mother testified at the post-conviction proceeding that just shortly before petitioner changed his plea that he told his mother that his attorney had "sold him out." If petitioner believed that, I find it unlikely that he would have put so much faith and confidence in that appeal advice so as to cause him to admit the crime.

The majority also reasons that if "petitioner considered entering a plea of guilty solely to escape execution the propitious time for doing so would have been prior to trial rather than at its conclusion." I cannot accept that as a general rule. It is not unusual for the defense to wait and test out the state's evidence in trial to see if some weakness can be developed in the state's case. What developed before the jury in this case, however, was a clear and convincing case of murder, and the total collapse of a weak unsubstantiated manslaughter theory of defense. Petitioner waited until the last minute before he changed his plea to avoid the death penalty.

When petitioner changed his plea he was asked by the trial judge if he had something to say.

> "Yes, Your Honor, Up to now I—I just wanted to tell the story, and face up to it."

I do not see that to be the comment of an accused confessing merely to get on with an appeal. At that same time the father asked the trial judge about who would make the determination of the sentence, but neither the father nor any one else made any inquiry of the court about appeal. Further, the petitioner then admitted to the court that he understood that unequivocally he was admitting that he had committed the offense of murder done without lawful justification and with intent to kill his wife, shoot her with a gun and beat her about the head thereby causing her death.

Appeal did follow, but only upon the issue of alleged excessiveness of the sentence. I find nothing in the record to show that any effort was made by petitioner to raise on that appeal any alleged trial errors or the issue of the alleged incorrect advice of counsel about appeal as inducing the guilty plea. It would seem that if appeal on those issues was what prompted the guilty plea something would be reflected in the appeal that immediately followed.

The *Brady* trilogy* cited by the majority is not antagonistic to my view of this case. *Brady* makes it clear that fear of death as a factor in a plea of guilty does not invalidate the plea, and says what we have been trying to say here:

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* *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); and *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

> The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. Cf. *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963); *Leyra* v. *Denno*, 347 U.S. 556, 558 (1954). One of these circumstances was the possibility of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. (Footnote omitted.) *Brady*, supra, 397 U.S. at 749.

And further at page 751:

> The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages * * * It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury. (Footnote omitted.)

McMann notes that even though a guilty plea must be intelligently made it is not a requirement that all advice offered by the defendant's lawyer withstand retrospective

examination in a post-conviction hearing. *McMann, supra* at 770. As I read that case the advice of counsel would have to be gross error which actually prompted the change of plea before the plea should be invalidated.

The majority also cites *Colson* v. *Smith*, 438 F. 2d 1075 (5th Cir. 1971) in which the court held that there was no evidence that counsel's advice to plead was based on any evaluation of the petitioner's chances had he gone to trial. That is not our issue. That case in reliance on the *Brady* trilogy takes note, however, that "guilty pleas are meant to be and should be final. And if there was ever any doubt in our minds of the inviolability of that principle, there is certainly no longer any doubt after the Supreme Court's recent decision declaring with unmistakable clarity its firm commitment to the finality of guilty pleas." In my view we are drastically weakening that principle in the present case.

I find no justification for invalidating the guilty plea. I do not, as the trial court and the majority did, find that "petitioner's reliance upon the advice of his attorney induced his plea. . . .," and to say that he did it to avoid the death penalty is "incredible", nor do I find in the record that it is "incontrovertible" that petitioner relied on the appeal advice of counsel in terminating the trial proceedings. In a clear case of murder in which there was no defense, we now, in effect, permit petitioner to manufacture for himself an undeserved opportunity, seven years after the murder, to try the second time to avoid responsibility for the murder which he admitted in court. This case may prompt much sifting and reconstruction of attorney advice to suit their immediate purposes by others seeking a way out after a change of heart. I believe petitioner was properly put where he belongs and where the public deserves to have him kept until his sentence has been served. I would reverse.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. GEORGE H. HEALEY, JR., *Petitioner,* vs. JOSEPH G. CANNON, Warden, Joliet Branch, Illinois State Penitentiary	No. 74 C 3046

MEMORANDUM OPINION

Petitioner is seeking habeas corpus relief under 28 U.S.C. § 2254. He is presently incarcerated in the Illinois State Penitentiary at Joliet, Illinois, where he is serving a 40 to 75 year sentence imposed on January 27, 1970, by the Circuit Court of DuPage County, Illinois, after his mid-trial plea of guilty to the murder of his wife. He appealed to the Illinois Appellate Court, Second District, contending that his sentence was excessive. That court affirmed the sentence on February 12, 1971, *People* v. *Healey,* 132 Ill. App. 2d 190, 267 N.E. 2d 753 (2d Dist. 1971), and leave to appeal that decision was apparently denied by the Illinois Supreme Court in April, 1971. Subsequently, petitioner filed a post-conviction petition in DuPage County Circuit Court which was denied after a hearing on March 17, 1972. The decision of the Circuit Court was

affirmed by the Illinois Appellate Court on October 11, 1974, *People* v. *Healey,* 23 Ill. App. 3d 214, 318 N.E. 2d 89 (2d Dist. 1974), and leave to appeal that decision apparently was denied by the Illinois Supreme Court during its January 1975 term.

On October 23, 1974, petitioner filed this pro se action. Judge Marovitz, to whom this case was then assigned, after issuing a rule to show cause and examining the written memoranda of the parties, appointed counsel to represent petitioner on December 19, 1974. This counsel filed a "Supplement to Petition for Writ of Habeas Corpus," on September 9, 1975, and respondent filed a "response," requesting summary judgment in his favor.

In his supplemental petition, petitioner contends that his guilty plea was coerced and improper. Furthermore, he asserts he was denied the right to a public trial and the right to trial by jury. Finally, he alleges he was denied the right to counsel in his defense both at trial and on appeal. We hold that petitioner was not denied the right to counsel either at his trial or on appeal, but that his plea of guilty was invalid and that he was denied the right to a public trial. We therefore grant the petition for a writ of habeas corpus.

I. FACTS

The parties substantially agree as to the facts surrounding the murder. The petitioner and his wife had been married for 12 years when she was murdered. Their marriage had been relatively successful, at least on the surface, until the last several years before her death. In the last year of their marriage, petitioner began to incur many debts and became a heavy drinker. As a result, much strife arose between him and his wife, they

separated, and his wife was considering divorce. Petitioner became very despondent, began to drink almost continuously, and contemplated suicide.

On the morning of the murder, the petitioner drove to his wife's apartment. Petitioner testified at trial that he thought he saw someone else in the apartment who exited from the back door as he entered the front door. His wife told him to leave and tried to slam the door on him. He forced the door open, chased his wife out the back door of the apartment, and followed her into a neighboring apartment. Petitioner fired several shots at his wife and hit her once. He then chased her into the kitchen of the second apartment, and after his gun jammed, beat her on the head and face with the butt of the gun, crushing her skull and killing her. These events were witnessed by the occupant of the neighboring apartment.

The petitioner pleaded not guilty. At the trial, after the state had presented its evidence and the defendant had testified in his own behalf, the petitioner sought to introduce the testimony of a Dr. Tuteur that his mental state at the time of the incident was such as to make the killing a crime of passion and the testimony of two priests concerning his mental state and degree of intoxication immediately prior to the incident. The trial judge refused to allow the introduction of this evidence. Moreover, the judge refused to tender an instruction to the jury on voluntary manslaughter as a possible lesser offense.

After the trial judge refused this instruction, petitioner's trial counsel requested a five minute recess. After this recess, the proceedings resumed in the judge's chambers, and the petitioner changed his plea to guilty.

II.

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

In his supplemental petition, petitioner claims that he is entitled to habeas corpus relief for a number of reasons. First, he contends that his guilty plea was not intelligent because his defense counsel advised him that his change of plea would not affect his rights on appeal and because the trial judge did not inform him that his change of plea waived such rights. Second, he asserts that his guilty plea was not voluntary because he was coerced into the plea by the improper exclusion of the testimony of Dr. Tuteur and the two priests, by the refusal to give the tendered instruction for voluntary manslaughter, and by the admission of improperly obtained evidence for purposes of impeachment. Further, he alleges that the trial judge and the prosecutor coerced his change of plea by threatening the imposition of the death penalty if he did not plead guilty. Third, petitioner contends he was incompetent to plead guilty at the time of his plea. Fourth, he asserts that he was denied the right to a public trial because the guilty plea was made in the judge's chambers. Fifth, he contends he was denied the right to trial by jury by the alleged coercion of his guilty plea and the imposition of a greatly increased sentence after he demanded a jury trial. Finally, he contends, he was denied the effective assistance of counsel both at trial and on appeal.

In the post-conviction proceedings, the petitioner raised all these contentions except for the issues of the inadequate warnings of the trial judge concerning his appeal rights, the alleged threats by the trial judge and the

prosecutor in regard to the death penalty, and the denial of a public trial at the taking of his guilty plea. Since the Illinois Supreme Court apparently denied petitioner leave to appeal the appellate court's decision affirming the trial judge's holding in the post-conviction proceedings, he has exhausted state remedies as to all claims made in those proceedings, and we can examine those issues. See 28 U.S.C. § 2254(b). In addition, he is deemed to have waived all state remedies as to those issues not raised in the post-conviction proceedings.[1] In our discussion of those issues, we will consider, when necessary, whether the waiver of state court remedies effectively waived federal habeas relief on those issues.

In his petition, petitioner does not request a hearing on any of these issues, apparently acknowledging either that the state courts gave him a full and fair hearing on them or that the material facts were adequately developed at the state court level. After examining the relevant papers and transcripts, we agree with petitioner that the material facts were developed in the state proceedings and under the rule of *Townsend* v. *Sain*, 372 U.S. 293, 312-14 (1963), conclude that a hearing on these issues is not necessary.

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1. Under *Ill. Rev. Stat.*, ch. 38, § 122-3, any claim of substantial denial of constitutional rights not raised in the original or amended post-conviction petition is waived.

III.

PETITIONER'S COMPETENCE TO PLEAD GUILTY

Petitioner contends that the evidence in the state record shows that he was incompetent to plead guilty at the time of his change of plea. He refers to evidence that he had difficulty making decisions on his own, that he was extremely insecure, and that he had suicidal tendencies. Respondent, on the other hand, points to the fact that petitioner was found competent to stand trial by three qualified psychiatrists. He asserts that, since these psychiatrists found that the petitioner was capable of understanding the nature of the charges against him and that he would be able to cooperate with his counsel, and, since the trial judge's examination of the petitioner showed he understood the nature of his plea, petitioner was competent to change his plea.

Petitioner does not dispute the psychiatric report nor does he suggest that his mental state changed appreciably between the psychiatric examination and the change of plea. Rather, he contends that competence to plead guilty should be distinguished from competence to stand trial because competence to stand trial requires only that the defendant be able to cooperate with counsel in the preparation of his defense, whereas competence to plead guilty requires that the defendant be able to make a decision solely by himself. Thus, petitioner reasons, even if he were competent to stand trial, he could still be incompetent to change his plea to guilty.

Contrary to the contentions of the petitioner, courts have held that the test for determining competence to plead guilty and competence to stand trial is the same: whether the defendant had the ability to understand the

nature of the charges against him and to assist in his own defense. *United States* v. *Harlan*, 480 F. 2d 515, 517 (6th Cir. 1973), *cert. denied*, 414 U.S. 1006 (1973). See *Patterson* v. *Slayton*, 331 F. Supp. 564, 566 (W. D. Va. 1971); *Crawn* v. *United States*, 254 F. Supp. 669 (M. D. Pa. 1966). The implicit holding of these cases, with which we concur, is that the ability to assist in one's own defense entails the same degree of competence needed to decide whether or not to plead guilty. Accordingly, we find petitioner's contention that a higher degree of competence is needed to plead guilty than to stand trial is without merit.

We conclude, therefore, that since the petitioner does not dispute the findings of the psychiatric report that he was competent to stand trial and since the trial judge's examination of the petitioner at the taking of the plea indicated he understood the nature of the proceedings, the petitioner was competent to plead guilty.

IV.

VOLUNTARINESS OF THE PLEA

A.

Petitioner contends that the prosecutor and trial judge coerced his change of plea by threatening the imposition of the death penalty if he did not plead guilty. He contends that the prosecutor, by offering to accept a guilty plea for a 15 to 40 or 20 to 50 year sentence previous to trial, recognized that this was not a proper case for the imposition of the death penalty. Nevertheless, petitioner asserts, the prosecutor requested the qualification of the jury for the death penalty. This request, he argues, was intended to threaten and coerce him into pleading guilty.

The alleged threat by the trial judge, petitioner asserts, occurred during the judge's admonishments previous to the taking of the guilty plea. At that time, the judge stated:

> ". . . the Court may impose a sentence for any term of years not less than 14 years, or, if the Court so sees fit, the Court may impose the death sentence.
> "Now, I will say outright that unless there is a jury that advises me to impose the death sentence I am not inclined to impose the death sentence."

Petitioner contends that this statement indicated to him that he could receive a death sentence only if he refused to plead guilty. Thus, he argues, the judge intimidated him into pleading guilty.

We find that these allegations of coercion are without merit. As to the alleged threats of the prosecutor, we disagree with petitioner's suggestion that a prosecutor is somehow bound to his initial offer made in plea negotiations, even if the defendant rejects it. A prosecutor can have many reasons for offering leniency to a defendant who pleads guilty. For example, he can be encouraging the speedy adjudication of cases or attempting to lower his caseload. If, after the defendant rejects this offer, the prosecutor wishes to request the qualification of a jury for the death penalty, he is not coercing the defendant into a guilty plea. Rather, he is exercising the kind of discretion which is inherent in his office.

In regard to the purported threats of the trial judge, we conclude that he did not cause petitioner's change of plea. In two cases, *McMann* v. *Richardson,* 397 U.S. 759 (1970), and *Parker* v. *North Carolina,* 397 U.S. 790 (1970), the Supreme Court appeared to set forth its standard in regard to threats of sentences. In *McMann,* one of the petitioners alleged that the trial judge had threatened to

impose a 60-year sentence if he was convicted after a plea of guilty. The Second Circuit held that such a threat could have resulted in a coerced plea. *United States ex rel. Ross* v. *McMann,* 409 F. 2d 1016 (2d Cir. 1969). The Supreme Court vacated this decision, but indicated its approval of the holding on the threatened sentence issue. *McMann, supra* at 774. In the other case, *Parker* v. *North Carolina,* the petitioner challenged the validity of a state statute which provided for a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a verdict of guilty by a jury. The Court held that "an otherwise valid plea is not involuntary because induced by defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial." *Parker, supra* at 795. The apparent difference between these two cases is that in *McMann,* the trial judge threatened a *certain* sentence if the defendant did not plead guilty, whereas in *Parker,* the statute informed the defendant only of a *possible range* of sentences. The Supreme Court apparently found a distinction between the coercive effect of these two situations.

Although this distinction may only be technical in most cases, it has validity in the instant case. In this case, the trial judge did not threaten to impose the death penalty if petitioner was tried and found guilty. He did not even tell petitioner he would absolutely impose the death penalty if the jury recommended it, but only that he was not inclined to impose it, except on the advice of a jury. The purpose of this statement was simply to inform the petitioner of the possible range of sentences, and could not have had a coercive effect on his plea.

B.

Petitioner also alleges that his guilty plea was coerced by the conduct of the trial judge during the trial. First, he contends, his plea was coerced because the judge improperly excluded the testimony of Dr. Tuteur concerning his mental state at the time of the killing and the testimony of the two priests in regard to his mental state at the time of the killing and the testimony of the two priests in regard to his mental state and degree of intoxication immediately prior to the incident. By improperly refusing to admit this evidence, petitioner argues, the trial judge substantially reduced the likelihood that he would get a favorable verdict from the jury and thereby coerced him into pleading guilty.

The second instance of alleged coercion was the court's refusal to tender an instruction for voluntary manslaughter. Petitioner contends that, under Illinois law, a manslaughter instruction must be given when there is any evidence to support a conviction for manslaughter and that there was ample evidence in the record in this case to support such an instruction. He points to evidence that he had been a heavy drinker, that he had been provoked by his wife's actions concerning their separation and that his wife had tried to prevent him from entering his own apartment. Thus, petitioner argues, this prejudicial error added to the atmosphere of coercion that surrounded his plea.

The final instance of alleged coercion concerned the state's use to impeach the petitioner of evidence obtained in a psychiatric examination. This examination took place pursuant to Ill. Rev. Stat. ch. 38, § 115-6,[2] which provides

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2. This section provides, in relevant part,

> If the defendant has given notice that he may rely upon the defense of insanity . . . or the defense of intoxicated or drugged condition . . . or if the facts and circumstances of the case justify a reasonable belief that the aforesaid defenses may be raised, the Court shall, on the motion of the state, order the defendant to submit to examination by one psychiatrist, to be named by the prosecuting attorney. . . . Any statements made by defendant to such experts shall be admissible against the defendant unless he raises the defense of insanity or the defense of drugged condition, in which case they shall be admissible only on the issue of whether he was insane or drugged. The refusal of the defendant to cooperate in such examination shall not preclude the raising of the aforesaid defenses but shall preclude the defendant from offering expert evidence or testimony tending to support such defenses if the expert evidence or testimony is based upon the expert's examination of the defendant.

for a psychiatric examination of a defendant if it appears that the defenses of insanity, intoxication, or drugged condition might be raised. At the trial, the state used information gathered in this examination to impeach the petitioner concerning his recollection of events surrounding the killing of his wife.

He contends that the use of the statements made to the psychiatrist violated his rights under the fifth amendment, as applied to the states through the fourteenth amendment, not to be compelled to give evidence against himself. By the terms of section 115-6, petitioner contends, he was compelled to submit to the psychiatric examinations. A statement elicited through such involuntary interrogation, he argues, is compelled testimony, which is inadmissible, under the rule of *Harris* v. *New York*, 401 U.S. 222 (1971), for any purpose since it is compelled in fact.

Consequently, he asserts, the trial judge, by allowing the admission of statements made during the psychiatric examination, coerced his guilty plea.

Under the Supreme Court's holding in *McMann* v. *Richardson, supra,* petitioner's contention that these incidents during the trial coerced his plea is without merit. *McMann* was a consolidation of three habeas corpus actions in which all three petitioners claimed, *inter alia,* that they were coerced into pleading guilty by the existence of an involuntary confession. The Court held that a defendant who, on the advice of competent counsel, deliberately bypasses a state hearing on his federal claim — that his confession was involuntary — cannot attack the plea in a later federal habeas action merely because of the existence of that confession.

Applying the *McMann* reasoning to this case and assuming that petitioner's trial counsel was competent, see Part VII, *infra,* it is clear that the petitioner in the instant case bypassed a state hearing on the allegedly improper decisions of the trial judge. If the petitioner believed that the trial judge had committed error, he should have continued his trial, and, if the jury found him guilty, appealed his case through the state court system, rather than bypassing his state court remedies. Thus, under *McMann,* petitioner cannot now complain that his plea was coerced by the alleged errors of the trial judge.

Although petitioner acknowledges the holding in *McMann,* he argues that this case comes within an exception to that decision. In *McMann,* plaintiff asserts, the Court noted that it did not have before it

> ". . . the situation where the circumstances that coerced the confession have abiding impact and also taint the plea. . . . It is not disputed that in such cases a guilty plea is properly open to challenge." *McMann* v. *Richardson, supra,* at 767.

Thus, petitioner asserts, *McMann* does not preclude relief in this case because the errors committed during the trial "were so numerous, substantial, and prejudicial that there was an abiding and crucially coercive effect on the decision to plead guilty."

Petitioner misconstrues this "exception" to the *McMann* holding. In a footnote to the section quoted above, the Court indicated that a petitioner could challenge a guilty plea on the ground that it was coerced by an involuntary confession if:

> "the alleged coercion producing the confession appear[s] to carry over to taint the pleas. . . ."

Thus, under this exception, for a petitioner to challenge his guilty plea, there must be coercive circumstances, independent of the alleged constitutional error, which affect the plea. In the instant case, petitioner alleges no such independent coercive circumstances.

We conclude, therefore, that petitioner's change of plea was not coerced either by the conduct of the prosecutor or the judge's rulings during trial.

V.

RIGHT TO TRIAL BY JURY

The petitioner contends that he was coerced into waiving his rights to a jury trial by the trial judge's statement that he would only impose the death penalty if petitioner chose to have his guilt or innocence tried by a jury. This argument is without merit since, as we held above, the trial judge did not threaten the imposition of the death penalty, but merely informed the defendant of the possible range of sentences. We find that such statements did not coerce petitioner to waive his right to a jury trial.

Petitioner also asserts that the prosecutor coerced his waiver of a right to a jury trial. He contends that the prosecutor initially offered to accept a guilty plea for 15 to 40 year and 20 to 50 year sentences, but threatened to withdraw and in fact did withdraw these offers immediately before the trial. Again, as we noted above, a prosecutor has broad discretion to make and withdraw sentence offers to defendants. Thus, we find no merit in petitioner's claim of coercion.

Finally, petitioner contends that his 40 to 75 year sentence was imposed to penalize him for insisting on a jury trial. We find nothing in the state court record to support this contention, and thus conclude it is without merit.

VI.

RIGHT TO A PUBLIC TRIAL

After the trial judge refused petitioner's counsel's request for a voluntary manslaughter instruction, he (counsel) requested a five minute recess. At the end of the recess, the transcript reads:

> "Mr. Wesolowski [petitioner's trial counsel]:
> "Do you want to have Frank bring the defendant in?
> "Mr. Laraia [Assistant State's Attorney]:
> "Frank, would you bring the defendant in here?
> "The Bailiff:
> "Yes, sir.
> "The Court:
> "Do you want his father in here, too?
> "Mr. Wesolowski:
> "I think so.
> "Frank, would you get Mr. Healey, Sr., too?

> (George H. Healey, Jr. entered the chambers)
> "The Court:
> "You may sit right there.
> "Mr. Wesolowski:
> "At this time, your Honor,—
> "The Court:
> "Wait a minute. Is there anybody else coming in?
> "Mr. Wesolowski:
> "Oh, Mr. Healey, Sr., yes.
> "Mr. Botti:
> "Is someone getting him?
> "Mr. Wesolowski:
> "Yes, Frank is:
> (George H. Healey, Sr. entered the chambers.)
> "The Court:
> "You may sit down, sir.
> "Mr. Wesolowski:
> "At this time, your Honor, after discussing —
> "The Court:
> "Do you want to shut the door, Frank?
> "Mr. Wesolowski:
> "After discussing this matter with my client, he requested that I move the Court for leave to withdraw his plea of not guilty heretofore entered and change his plea to guilty." [Trial R. 778-779]

Petitioner contends that his sixth amendment right to a free trial, as applied to the states through the fourteenth amendment, was violated by the taking of his plea in chambers. The sixth amendment reads, in part,

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ."

The policy underlying the guarantee of a public trial was stated by Mr. Justice Black in *In re Oliver*, 333 U.S. 257, 268-70 (1948):

> "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet.* All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."

Courts have held that the guarantee to a public trial is applicable to more than a full-fledged trial. In *United States ex rel. Bennett* v. *Rundle,* 419 F. 2d 599 (3d Cir. 1969), for example, the court held that a hearing on a motion to suppress a confession must be conducted as a public trial. In that case, after the jury had been sequestered, the court excluded all persons other than the defendant, the attorneys, the witnesses, and court officials from the courtroom during a suppression hearing. It is apparent from the decision that the court reporter remained in the courtroom. The court held that this procedure violated petitioner's constitutional rights by frustrating the sixth amendment's policy of public exposure of claims and discouragement of judicial oppression.

In at least one reported case, the court held that the guarantee to a public trial is applicable to the receipt of a guilty plea. *Garcia* v. *Sanford,* 62 F. Supp. (N. D. Ga. 1945). In *Garcia,* the petitioner in a habeas proceeding alleged that his sixth amendment rights were violated when he changed his plea to guilty and was sentenced in

the trial judge's chambers. According to the affidavits of the parties, petitioner's trial counsel had requested that the proceedings occur in chambers as an accommodation to him. The judge granted this request, and the petitioner changed his plea in chambers. The judge then imposed sentence on him in the presence of the Clerk, the Deputy Marshall, the Assistant District Attorney, and defense counsel. The court held that petitioner's rights to a public trial were violated, stating that the requirement of a public trial "is a protection afforded not only to a defendant, but also to society and safeguards against the possibility of star chamber proceedings." *Garcia* v. *Sanford, supra* at 659.

We agree with the court in *Garcia* and conclude that petitioner's sixth amendment rights were violated by the proceedings in chambers. The procedure used by the trial judge in this case is very dangerous, both to defendants and to society. For defendants, a hearing which is closed to the public, frustrates the policy of *Boykin* v. *Alabama,* 395 U.S. 238 (1969), that a guilty plea must be "voluntary and intelligent." In the atmosphere of a judge's chambers, a defendant may feel intimidated into making his plea or may not realize the seriousness of his actions. For the public, as the court in *Garcia* noted, such proceedings have an aura of the star chamber.

The presence of a court reporter does not remedy these problems. Although the existence of a transcript does preserve a record for appeal, it does not substantially reduce the psychological effect on the defendant of a closed proceeding; nor does it greatly lessen the public's mistrust of possible judicial oppression. This reasoning is consistent with the implicit holding in *United States ex rel. Bennett, supra,* in which the court concluded that a suppres-

sion hearing which was closed to the public was unconstitutional even though a court reporter was apparently present.

Respondent contends that the petitioner waived his claim of a sixth amendment violation by his voluntary plea of guilty and by his bypass of state proceedings. In support of his contention that petitioner waived this claim by his plea of guilty, he relies on *McMann* v. *Richardson, supra,* which held that guilty pleas generally waive all nonjurisdictional defects in any prior stage of proceedings. This holding, however, has no application to petitioner's sixth amendment claims. This claim concerns the unconstitutionality of the proceedings surrounding the guilty plea, not events prior to the plea.

Respondent's second contention is that petitioner intentionally waived his sixth amendment claim by failing to raise this issue at trial, on appeal, or in his post-conviction hearing. In *United States ex rel. Allum* v. *Twomey,* 484 F. 2d 740 (7th Cir. 1973), the Seventh Circuit held that a deliberate tactical decision by competent counsel not to raise an issue at trial, even if made without the participation of his client, may waive his client's right to raise this claim at a subsequent federal habeas proceeding. In the instant case, since petitioner's failure to object to the closed proceedings appears to have had no tactical basis, we conclude that petitioner has not waived his claim.[3]

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3. In his brief, respondent also suggests that the petitioner waived his sixth amendment rights by initiating the proceedings in chambers. Although courts disagree whether the right to a public trial can be waived by a defendant, compare *United States ex rel. Bennett* v. *Rundle, supra* (defendant can waive right) with *Lewis* v. *Peyton,*

Petitioner contends that his defense counsel at the trial did not adequately advise him of the effect of his plea of guilty. He asserts, therefore, that his guilty plea was not intelligent and that he was denied the right to adequate counsel. He argues that both he and his father were concerned with preserving all trial errors for later review on appeal, that his trial counsel, Mr. Wesolowski, assured him that his guilty plea would not waive any of his rights on appeal, and that only because of these assurances, he pleaded guilty. This advice, he asserts, was incorrect since a guilty plea in Illinois waives all nonjurisdictional errors occurring prior to the plea except those that go to the validity of the plea itself. *People* v. *Mahle,* 57 Ill. 2d 279, 312 N.E. 2d 267 (1974).

Respondent, on the other hand, contends that Mr. Wesolowski only expressed his *opinion* that a reviewing court

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352 F. 2d 791 (4th Cir. 1965) (defendant probably cannot waive right), the issue does not arise in this case because the part of the record relied on by respondent to support his contention of waiver does not indicate that the petitioner or his counsel initiated the closed proceedings. This section begins,

> " A recess was taken)
>
> "Mr. Wesolowski:
>
> "Do you want to have Frank bring the defendant in?
>
> "Mr. Laraia:
>
> "Frank, would you bring the defendant in here?"

All this section shows is that after the recess, the petitioner's attorney and the Assistant State's Attorney were in the judge's chambers. In any event, in *Garcia* v. *Sanford, supra,* the proceedings were in chambers at the petitioner's trial counsel's request.

We, therefore, conclude that petitioner was denied the right to a public trial.

VII.

INTELLIGENCE OF PLEA AND COMPETENCE OF COUNSEL

in *certain* circumstances might review trial errors after a guilty plea. Further, he contends that this advice was not so incompetent as to deny petitioner effective representation of counsel.

In the post-conviction proceedings, the trial court held that, based on the evidence adduced at the hearing, the petitioner had failed to establish constitutional inadequacy of trial counsel. On appeal of this decision, the Second District Appellate Court held:

> "As to the allegation of improper advice at the time the change of plea was discussed, defendant asserts that he was assured by counsel that the psychiatric testimony and manslaughter instruction issues would not be waived by a plea of guilty. Our review of the record leads us to the conclusion that even if this advice was erroneous it was harmless and did not result in substantial prejudice to defendant's rights since the proof of defendant's guilt was overwhelming. See *McMann* v. *Richardson* (1970), 397 U.S. 759. . . ." *People* v. *Healey*, 318 N.E. 2d 89, 94 (2d Dist. 1974)

The proper standard to use in examining this issue, as recognized by the Appellate Court, was set forth in *McMann* v. *Richardson*. As noted above, in that case, petitioners sought habeas corpus relief alleging that their guilty pleas were coerced by the existence of involuntary confessions. The Supreme Court held that they could not challenge their pleas unless they proved incompetent advice of counsel. The Court reasoned that a defendant,

faced with a confession, would most likely plead guilty only if he considers it voluntary, and hence admissible at trial; conversely, he would probably contest his guilt at trial if he believed the confession was involuntary and inadmissible at trial. Consequently, the Court concluded, the petitioners could only successfully attack their guilty pleas if the trial counsel gave them incompetent advice as to the admissibility of a confession and thereby rendered the plea unintelligent. In discussing the standard for judging the competence of counsel's advice, the Court stated,

> "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. Courts continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper standard by which the facts are to be judged and with respect to the application of that standard to particular facts. That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies the conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.
>
> "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on *whether that advice was within the range of competence demanded of attorneys in criminal cases* [footnote omitted]" [emphasis added] *McMann* v. *Richardson, supra,* at 770-71.

In the instant case it is clear, based on the evidence adduced at the post-conviction hearing, that Mr. Wesolowski did advise the petitioner that his plea of guilty would not waive his rights on appeal. At that hearing, he would be able to raise the points on appeal that he was not able to raise at trial. His father testified that he was very concerned that a guilty plea might waive all petitioner's rights on appeal and that he sought assurances from Mr. Wesolowski three different times whether that would be the effect of the plea. He stated that Mr. Wesolowski told both him and his son that a change of plea would not affect petitioner's rights on appeal and that the situation would be the same on appeal whether the jury found him guilty or he pleaded guilty. Mr. Wesolowski, in an affidavit submitted by the state at petitioner's post-conviction hearing, stated,

> ". . . it was my opinion that in this case, because of the record that was made and the testimony presented, that if the Court should have allowed the hypothetical question and Dr. Tuteur's answer to the hypothetical question to go to the jury, or if the Court should have given an instruction on voluntary manslaughter, that a reviewing court, notwithstanding the plea, would examine the record and authorities on the subject and would reverse the conviction and remand the cause for a new trial. Since these questions were not raised on appeal, I can only state that my advice was based on my knowledge of the law that where a defendant enters a guilty plea after an adverse ruling on a motion to suppress evidence, that the reviewing courts have reviewed the propriety of the court's ruling on the motion to suppress evidence notwithstanding guilty pleas."

At the hearing, Mr. Wesolowski testified,

> "The defendant inquired of me whether or not the possibility that the Judge ruled in error would be preserved for appeal, — that ruling would refer to both the hypothetical and the ruling on the instruction — and I indicated that if the Judge's ruling in fact was in error, notwithstanding a guilty plea, it was my personal opinion that a reviewing Court would review the issue, and the father and the defendant extracted assurances from me, although, of course, all I could do was give them what was my opinion of the law."

It is clear that Mr. Wesolowski's advice was incorrect since, in Illinois, a plea of guilty waives any nonjurisdictional defect unless the plea is coerced or otherwise wrongfully obtained. *People* v. *Deweese,* 27 Ill. 2d 332, 189 N.E. 2d 247, 249 (1963). The question remains, however, whether under the *McMann* test, this advice was "within the range of competence demanded of attorneys in criminal cases." We believe it was not. From the testimony at the post-conviction hearing, it is evident that both the petitioner and his father were very concerned that he would not waive his rights on appeal and indicated that they intended to appeal. Mr. Wesolowski assured them three different times that petitioner's rights on appeal would not be affected by his change of plea. This opinion was not merely a reasonable mistake of law, but was a major misinterpretation of the Illinois law. The state concedes in its original motion for summary judgment that if petitioner was misled by counsel into waiving any appeal on reversible error committed by the trial judge, "it would certainly constitute a miscarriage of justice, if not a denial of due process" (page 10). Under these circumstances, petitioner's plea cannot be considered intelligent.

The Illinois Appellate Court, we believe erroneously, held that "even if this advice was erroneous, it was harmless and did not result in substantial prejudice to defend-

ant's rights since the proof of defendant's guilt was overwhelming." *People* v. *Healey,* 318 N.E. 2d at 94. In reviewing a guilty verdict, if the trial court has committed constitutional error, the question arises whether the evidence in the total record is sufficient to support the verdict despite the error. In reviewing a guilty plea, however, since there is no verdict and no completed record to examine to determine whether only harmless error was committed, the only issue is whether the constitutional error affected the change of plea. In this case, we conclude that petitioner would, in all probability, not have pleaded guilty had he known he was waiving all trial errors by so doing.

We recognize the dangers in invalidating a guilty plea based on conversations between a defendant and his counsel. There is the possibility that defendants will fabricate purported conversations between themselves and their counsel and then argue that their pleas were not intelligent. We note, however, that these dangers do not exist in the instant case because objective evidence exists — the testimony of petitioner, his father, and Mr. Wesolowski — that Mr. Wesolowski gave petitioner the erroneous advice. As the court indicated in *United States ex rel. Curtis* v. *Zelker,* 466 F. 2d 1092, 1101 (2d Cir. 1972), *cert. denied,* 410 U.S. 945 (1973), when there is substantial objective supporting evidence of improper advice by counsel, a writ can be issued.

We conclude, therefore, that petitioner's guilty plea was not intelligent because of incompetent representation by counsel.

B.

Petitioner also contends that his plea was not intelligent because the trial judge failed to inform him of his rights *on appeal.* In support of this contention, he relies on *Boy-*

kin v. *Alabama,* 395 U.S. 238 (1969). The Court in *Boykin,* however, never addressed this issue, and in light of the trial judge's thorough examination of the petitioner concerning his change of plea, we find that he committed no constitutional error.

VIII.

CONCLUSION

In summary, we conclude that petitioner's claims that he was incompetent at his change of plea, that his plea was involuntary, and that he was denied a trial by jury are without merit. On the other hand, we conclude that petitioner was denied the right to a public trial and that his guilty plea was rendered unintelligent and invalid by incompetent advice of counsel. We, therefore, will grant the writ of habeas corpus unless, within 120 days, the state takes action to hold a new trial.

An appropriate order will enter.

/s/ HERBERT LIDELL
United States District Judge

DATED: June 25, 1976